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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NYLONDA SHARNESE, Plaintiff and Appellant, v. AFFORDABLE LEGAL HELP, INC. et al., Defendants and Respondents.	B230730 (Los Angeles County Super. Ct. No. PC048509)

APPEAL from an order of the Superior Court of Los Angeles County, Margaret L. Oldendorf, Judge. Reversed.

Nylonda Sharnese, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Nylonda Sharnese appeals from an order of the trial court dismissing without prejudice her complaint against Affordable Legal Help, Inc., Edward Madison, Eugene Maryl Lerner, and WorldWin Marketing Corporation (WorldWin) (collectively respondents). The court dismissed the complaint for inadequate proofs of service. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On February 26, 2010, appellant filed a complaint against Affordable Legal Help, Madison, Lerner, Jonathan Doe,[1] and 20 unknown Doe defendants, alleging breach of contract, fraud, defamation, and intentional infliction of emotional distress. Appellant was employed by Affordable Legal Help from February 1, 2010 to February 16, 2010, as a liaison between paralegals and clients. She was responsible for entering client data and ensuring that forms were properly completed by paralegals. However, numerous clients allegedly told her they never received any services from Affordable Legal Help.

Appellant alleged in her complaint that respondents wrongfully terminated her and breached her contract when she refused to be part of the scam the company was running, did not pay her for work performed pursuant to the contract, and falsely accused her of stealing from the company. Appellant further alleged that Madison repeatedly assured her that he would have paralegals work with her, but he never did so. Appellant sought $21,400 in damages.

Appellant filed proofs of service of summons and complaint as to Affordable Legal Help, Madison, and Lerner. On April 26, 2010, appellant, represented by counsel, filed a request for entry of default judgment against respondents.

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[1] On April 26, 2010, appellant asked the court to dismiss the complaint as to Jonathan Doe.

On the same date, appellant filed an amendment to her complaint, having discovered that WorldWin was the true name of one of the Doe defendants. She also filed a statement of damages, seeking a total of $53,550. The proof of service indicated that the statement of damages and request for default was served on respondents by mail.

Appellant filed an amended complaint, seeking reclassification from a limited to unlimited civil case. On June 3, 2010, the superior court reclassified the case and transferred it.

On June 21, 2010, appellant filed a request for entry of default judgment against respondents in the amended amount of $47,900. On July 19, 2010, the court sent a notice of rejection of appellant's request for default, on the grounds that an amended summons was not filed with the amended complaint, and that appellant needed to file a request for court judgment, not a request for clerk's judgment.

At a case management conference on July 28, 2010, the trial court found that defaults were improperly entered on April 26, 2010.[2] The court gave two reasons. First, there was no proof that the statement of damages was personally served on respondents prior to entry of default, as required by Code of Civil Procedure section 425.11, subdivision (d).[3] Second, the court found that the entry of default against Eugene Maryl Lerner was inappropriate because the court thought this

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[2] The record does not indicate that any defaults had been entered.

[3] Further statutory references are to the Code of Civil Procedure unless otherwise specified.

name did not match exactly the name of a defendant in the original complaint.[4] The court therefore ordered the defaults entered on April 26, 2010, to be vacated.

The court further stated that the amended complaint was filed on April 28, 2010, "adding an additional Defendant, WorldWin Marketing Corporation, and apparently correcting the name of Defendant Lerner." However, the court noted that no amended summons had been issued in connection with the amended complaint, and no proofs of service had been filed.

The court thus decided to reject appellant's June 21, 2010 request for entry of default "in order for the foregoing procedural deficiencies to be remedied." The court set an Order to Show Cause (OSC) regarding the issuance of an amended summons and the filing of proofs of service as to the amended complaint and scheduled a hearing for September 29, 2010. The court added that, although appellant's counsel failed to appear at the July 28 hearing, the court would not set an OSC for sanctions for this failure.

On August 5, 2010, appellant filed an amended summons and proofs of service of the amended complaint on respondents. The proofs of service indicated that all the respondents were served on May 6, 2010, and were stamped as received by the court on August 5, 2010. The parties were served with the amended complaint by delivery to Tina Berzas, who was described as the owner of Mail 'N' More and the "authorized agent" for each of the respondents.

Appellant also filed a request for entry of default against respondents and a statement of damages, seeking $45,800 total damages. Her counsel filed an affidavit, declaring the following. He stated that appellant was employed by Affordable Legal Group from February 1, 2010 to February 16, 2010, as a liaison

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[4] It is unclear why the court thought this name was not in the original complaint. Eugene Maryl Lerner was named as a defendant in the complaint.

between clients and paralegals. During her employment, appellant spoke with 120 of Affordable Legal Group's clients, all of whom told her they had not received any services they contracted for from the company. Appellant thought that the company was operating a scam, so she contacted a news station and several attorneys, but respondents fired her when they found out she was aware of the scam. Appellant's counsel further stated that he had personal knowledge that respondents had received notice of the pleadings and willfully refused to answer, and that they had closed down the business address because of appellant's action, making it impossible to serve them with the statement of damages. He also stated that appellant had exercised due diligence in attempting to serve respondents.

On September 13, 2010, the clerk of the court issued a notice of rejection, stating that the request for entry of default was premature as to WorldWin because "Proper proof of service of summons and complaint and statement of damages has not been filed on added defendant WorldWin Marketing. A proper proof of service on remaining defendants for amended summons and statement of damages has not been filed. Summons was issued 8/5/10." The notice further stated that, "Service to a third party is considered sub service. [¶] Individual person does not have an agent for service – again it is considered sub served. [¶] Corporations and businesses may have an agent for service/process."

On September 29, 2010, the court held a hearing. The minutes state that "Court and counsel confer re incomplete proofs of service and missing proofs of service as further reflected in the notes of the Court Reporter." The case management conference was continued to December 1, 2010, and the court set an OSC regarding "Proper Proofs of Service or Dismissal" on December 1.

Appellant filed proofs of service as to the amended summons and statement of damages on December 1, 2010. The documents indicated that the parties were

served on September 25, 2010, by delivery to Berzas, the owner of the private mailbox company. On all the documents, the box was checked indicating that service was effected by personal service, rather than by substituted service.

On December 1, 2010, the court found the proofs of service "inadequate as further reflected in the notes of the Court Reporter." The court thus ordered the case dismissed without prejudice pursuant to sections 583.130 and 583.150, California Rules of Court, rule 2.30, Los Angeles Superior Court Rule 7.13,[5] and Government Code section 68608, subdivision (b). Appellant timely filed a notice of appeal.[6]

DISCUSSION

The trial court dismissed this case because of inadequate proofs of service. Pursuant to the relevant sections of the code of Civil Procedure, "a minimum delay of two years is required before a trial court can exercise its discretionary dismissal powers. [Citations.]" (*Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 915 (*Lyons*).) Because the case was dismissed less than one year after the complaint was filed, the court abused its discretion.

Personal service of process may be effected upon an individual or a corporation by serving someone authorized to accept service on the individual's or corporation's behalf. (§§ 416.10, 416.90; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶¶ 4:128, 4:140, pp. 4-19 to

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[5] Former rule 7.13 has been reclassified as rule 3.10. The rule provides, in part: "The court may impose appropriate sanctions for the failure or refusal to comply with the rules in this chapter, including the time standards and/or deadlines, and any court order made pursuant to the rules." (Super. Ct. L.A. County, Local Rules, rule 3.10.)

[6] On March 30, 2011, the appeal was dismissed for failure to procure the record, but the order of dismissal was vacated and the appeal reinstated on April 25, 2011.

4-22.1 (Rutter).) Substitute service may be effected by "leaving a copy of the summons and complaint during usual office hours in his or her office or, if no physical address is known, at his or her usual mailing address, other than a United States Postal Service post office box, with the person who is apparently in charge thereof, and by thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left." (§ 415.20, subd. (a); see Rutter ¶¶ 4:206, 4:218, pp. 4-31 to 4-34.) Although a United States post office box is excluded, the "usual mailing address" does include private mail boxes. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1201; see Rutter ¶ 4:210, p. 4-32.) The record indicates that service of process was effected by service on Berzas, the owner of the private mailbox service.

Sections 583.110 through 583.430, found in Part 2, title 8, chapter 1.5 of the Code of Civil Procedure, govern dismissals for delay in prosecution. Dismissal is mandatory if a defendant is not served within three years after the action is commenced, or if no proof of service is filed within 60 days after the end of the three-year period. (§§ 583.210, 583.250.)

Discretionary dismissal is addressed in sections 583.410 through 583.430, found in article 4 of chapter 1.5. Section 583.410 gives the court discretion to dismiss an action for delay in prosecution on its own motion "if to do so appears to the court appropriate under the circumstances of the case." (§ 583.410, subd. (a).) However, "[s]ection 583.420 of article 4 provides in part: '(a) The court may not dismiss an action *pursuant to this article* for delay in prosecution except after one of the following conditions has occurred: [¶] (1) Service is not made within two years after the action is commenced against the defendant.'" (*Hawks v. Hawks* (2006) 141 Cal.App.4th 1435, 1437 (*Hawks*), italics in original; see also Cal. Rules

of Court, rule 3.1340(a) ["The court on its own motion or on motion of the defendant may dismiss an action under Code of Civil Procedure sections 583.410-583.430 for delay in prosecution if the action has not been brought to trial or conditionally settled within two years after the action was commenced against the defendant."].) Thus, "'it is not within the discretionary power of the trial court to dismiss an action until two years after it has been filed; a plaintiff may not be penalized for failing to bring even the least complicated case to trial during this period.' [Citation.]" (*Cohen v. Hughes Markets, Inc.* (1995) 36 Cal.App.4th 1693, 1698 (*Cohen*), quoting *General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 98; see also *Lyons*, *supra*, 42 Cal.3d at p. 915.)

Pursuant to these provisions, the court in *Cohen* concluded that, "[b]ecause the instant action was filed November 19, 1991, the trial court lacked discretion to dismiss the action for lack of prosecution less than two years later, on August 16, 1993." (*Cohen*, *supra*, 36 Cal.App.4th at p. 1698.) Similarly, the court in *Hawks* reversed an order of dismissal for delay in prosecution where the complaint was filed on May 5, 2005, and the court dismissed the action on July 19, 2005. (*Hawks*, *supra,* 141 Cal.App.4th at p. 1437.)

Here, the complaint was filed on February 26, 2010, and the case was dismissed for inadequate service of process on December 1, 2010. This delay of less than one year is not an adequate ground for discretionary dismissal.

The trial court cited the following provisions in dismissing the case: sections 583.130 and 583.150, California Rules of Court, rule 2.30, Los Angeles Superior Court Rule 7.13, and Government Code section 68608, subdivision (b). None of these provisions provides adequate grounds for dismissal. The record is clear that the court dismissed the case for inadequate proofs of service, a discretionary dismissal that, as discussed above, requires a delay of two years.

Sections 583.130 and 583.150 are found in part 2, title 8, chapter 1.5, article 1, which is the "Definitions and General Provisions" article for the chapter on "Dismissal for Delay in Prosecution." These sections merely set forth general policies regarding a dismissal for delay in prosecution.

Section 583.130 is a declaration of the state's policy that a disposition on the merits is preferred over a dismissal for delay in prosecution. (*Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 347, fn. 6.) The statute provides as follows: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter."

Similarly, section 583.150 sets forth the policy that chapter 1.5 does not limit the court's authority to dismiss an action or impose sanctions under local rules or the court's inherent authority. This section states: "This chapter does not limit or affect the authority of a court to dismiss an action or impose other sanctions under a rule adopted by the court pursuant to Section 575.1 or by the Judicial Council pursuant to statute or otherwise under inherent authority of the court." Nonetheless, the Law Revision Commission Comments note that the court's inherent authority may not be exercised contrary to statute. (Cal. Law Revision Com. com., 15C West's Ann. Civ. Proc. Code (2011 ed.) foll. § 583.150, p. 315.)

Moreover, a court's inherent authority to dismiss an action should only be exercised "in extreme situations, such as when the conduct was clear and deliberate, where no lesser alternatives would remedy the situation [citation], the fault lies with the client and not the attorney [citation], and when the court issues a directive that the party fails to obey. [Citation.]" (*Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 799; see also *Lyons, supra*, 42 Cal.3d at p. 916 [explaining that the use of the court's discretionary power to dismiss with prejudice has been "tightly circumscribed" because of the long-standing policy favoring a decision on the merits rather than on procedural grounds].) The record here does not indicate that any of these types of extreme situations existed.

Nor do the other provisions cited by the trial court justify dismissal of the case. The rules cited by the court address the court's power to impose sanctions. California Rules of Court, rule 2.30(b) provides that, "[i]n addition to any other sanctions permitted by law, the court may order a person, after written notice and an opportunity to be heard, to pay reasonable monetary sanctions to the court or an aggrieved person, or both, for failure without good cause to comply with the applicable rules." The instant case involved involuntary dismissal for failure to prosecute, not the imposition of monetary sanctions.

The local rule cited by the court is merely a general provision that allows the court to impose sanctions for the failure to comply with local rules and court orders. (Super. Ct. L.A. County, Local Rules, rule 3.10.) Even when acting pursuant to its inherent authority, the court cannot proceed in a manner inconsistent with statute. (See *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1352 ["[L]ocal courts may not create their own rules of evidence and procedure in conflict with statewide statutes."]; *Alvarez v. Superior Court* (2010) 183 Cal.App.4th 969, 982

["Local court policies and procedures, as well as local court rules, 'are only valid to the extent they do not conflict with existing law.' [Citation.]"].)

The other provision cited by the trial court was Government Code section 68608, subdivision (b), which provides as follows: "Judges shall have all the powers to impose sanctions authorized by law, including the power to dismiss actions or strike pleadings, if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case. Judges are encouraged to impose sanctions to achieve the purposes of this article."

"By its terms, Government Code section 68608(b) gives trial courts only those sanctioning powers 'authorized by law.' Under its plain and commonsense meaning, the phrase, 'authorized by law,' incorporates only those sanctioning powers that the law otherwise establishes, . . . It does not express a legislative intent to establish an independent sanctioning power." (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.)

In *Tliche v. Van Quathem* (1998) 66 Cal.App.4th 1054 (*Tliche*), the court addressed "the trial court's authority and obligations regarding dismissal of a complaint for violation of local fast track rules." (*Id.* at p. 1056.) On appeal, the court found that "the trial court failed to consider less drastic measures than dismissal as the first sanction (Gov. Code, § 68608, subd. (b)). Also, the trial court failed to take into account that service of process is ordinarily within the power of counsel as opposed to the client; therefore, in the absence of any information to the contrary, the sanction for failure to serve the complaint within the time period specified by the local delay reduction rule should, in the first instance, be levied against the attorney in the form of monetary sanctions and not against the client by

dismissing the case. [Citation.]" (*Tliche, supra*, 66 Cal.App.4th at p. 1056.) The court therefore reversed the order of dismissal. (*Ibid.*)

As in *Tliche*, the court here did not consider less drastic measures than dismissal as the first sanction. Moreover, the requisite minimum delay of two years did not pass before the trial court exercised its discretionary dismissal powers. (*Lyons, supra*, 42 Cal.3d at p. 915.) The order accordingly must be reversed.

DISPOSITION

The order of dismissal is reversed. Appellant shall recover her costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.